

Brigitta Lurger; Grundfragen der Vereinheitlichung des Vertragsrecht in der Europäischen Union

Citation for published version (APA):

Hardy, R. R. R., & Kornet, N. (2004). Brigitta Lurger; Grundfragen der Vereinheitlichung des Vertragsrecht in der Europäischen Union. *Maastricht Journal of European and Comparative Law*, 11(2), 201-205. <https://doi.org/10.1177/1023263X0401100206>

Document status and date:

Published: 01/01/2004

DOI:

[10.1177/1023263X0401100206](https://doi.org/10.1177/1023263X0401100206)

Document Version:

Accepted author manuscript (Peer reviewed / editorial board version)

Please check the document version of this publication:

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Verschenen in: 11 **Maastricht Journal of European and Comparative Law** 2 (2004), p. 201-205.

Book Review: Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, Springer Verlag, 2002, xiv + 599 pages, paperback , €129.00.

1. INTRODUCTION

Over the last decade, the discussion on the future harmonization of contract law in Europe has gained momentum, in particular since the EC Commission's Communication on European Contract Law and its follow-up, the Action Plan.¹ The discussion on the future of contract law in Europe has addressed a number of related issues: the desirability and feasibility of harmonization, the form and content of a European contract law. In *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, a condensed version of the author's *Habilitationsschrift* of the same title, completed in April 1999 at the Universität Graz, Brigitta Lurger also addresses many of these issues, but in addition to the existing scholarship she initiates a discussion on the development of an underlying values system that is to provide a foundation for the future harmonization of contract law in Europe.

2. CONTENT

Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union comprises an introduction and 6 chapters in which Lurger investigates various themes relevant to the harmonization of contract law in the EU. Following her general introduction, Lurger outlines the current discussion on the harmonization of contract law in Europe. Notwithstanding the ongoing debate in legal scholarship on the appropriate legal basis for a future harmonization, she establishes that the EC is competent to harmonize contract law on the basis of art. 95 EC Treaty. In chapter 1, Lurger subsequently concludes that a pre-requisite for such harmonization is the development of an underlying values system for the European contract law to be created. This first chapter, which takes up more than one third of the book, forms the departure point for the remaining discussion, in which Lurger claims to provide a basis for the development of a coherent system of underlying values which is to be based on fundamental rights and freedoms (chapter 2), the protection of the weaker party by way of a *Schutzgedanken* (chapter 3) and new developments in contract law theory (chapter 4). In Chapter 5, Lurger illustrates her conclusions using some specific topics of contract law (information duties and change of circumstances). Finally, she summarizes her findings in chapter 6.

In chapter 2, Lurger investigates the role of fundamental rights and freedoms for the harmonization of contract law. She concludes that constitutional rights provide orientation points for contract law which can contribute to its coherence, transparency and legitimacy as well as assist in the preparation and later application of a European contract law. According to Lurger, national catalogues of rights are generally oriented to traditional, liberal values and do not take sufficient account of protection and fairness. The current European instruments are 'lückenhaft und ungenügend', however, the development of a new EU catalogue of rights can potentially make an important contribution and could stimulate Member States to look into the deficits of their traditional, liberal and individualistic rights, which are, according to Lurger, no longer 'zeitgemäß'. In her opinion, a social right to a fair contractual relationship

¹ COM (2001) 398 final, [2001] OJ C255, available at http://europe.eu.int/comm/consumers/policy/developments/contract_law/cont_law_02_en.pdf and COM (2003) 68 final, [2003] O.J. C-63/01, available at http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf

should also be contained in national and European catalogues of rights, in order to protect one party from the economic power of the other.

Chapter 3 discusses the perceived crevice between the older 'general' law of contract and the modern specific (predominantly mandatory) contract law that aims to protect employees, tenants, consumers and other weaker parties. Lurger investigates, for consumer contracts in particular, the relative value for a future EC contract law of the ever-increasing incorporation of norms that protect a weaker party in national and European contract law. Finding the gap between general and specific contract law as disadvantageous in both the national and EC context, Lurger concludes that a (partial) consolidation of general contract law and specific protective law is desirable and feasible. She illustrates methods to bridge the gap between special, protective law and a 'general' contract law and concludes that a systematic and dogmatic penetration of special protective law can fill out the general rules and principles. This process of combining of general contract law and special protective law is to be guided by the principle of 'Rücksichtnahme und Fairness'. In this, commercial contracts should not be treated differently.

In order to find the right mix for European contract law, Lurger looks at new developments in contract theory in chapter 4.² She concludes that the liberal will theory is no longer satisfactory as an explanation of, and foundation for, contract law. The market's goals can no longer simply be achieved on the basis of unrestricted party autonomy. Therefore, the will theory must be substituted by a new theory which is in a position to provide a complete explanation for contract law for the modern society. Lurger discusses the contributions of *Ordoliberalismus*, law and economics, Critical Legal Studies, Wilhelmsson's social contract law, Adams and Brownsword, Collins' social market and Gautrais and Ghestin to contract law scholarship. She concludes that the line between self interest and regard for the other must be explained by 'der weiteren Perspektive einer gesellschaftspolitisch wünschenswerten Gestaltung der Beziehungen auf dem Markt, aus einem breiter gefächerten Gerechtigkeitskonzept oder dem Konzept eines "sozialen Marktes" à la Collins.'³ This concept goes beyond merely respecting the interests of the other party. It also requires regard for collective interests.

3. DISCUSSION: CLASSICAL TO MODERN CONTRACT LAW THEORY

Lurger discusses many themes in *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* which are topical in contemporary contract scholarship; for instance, the desirability and feasibility of contract law harmonization, the constitutionalization of contract law and the desirability of a fragmented contract law (general vs. specific contract law). Her book can also be positioned in the current scholarship identifying and supporting a shift from classical to modern contract law theory, in which new principles arise to compensate the perceived breakdown of 'classical contract law' and the principle of freedom of contract.⁴ Lurger's conclusion that traditional, liberal and individualistic values no longer have a place in contemporary contract theory, leads her to identify a principle of 'Rücksichtnahme und Fairness', which exists in addition to the freedom of contract, in order to find a just balance between the individual parties' interests and a social market (which also requires consideration of the interests of third parties, the environment, collective goods such as a functioning market, the protection of weaker market participants and the promotion of

² This chapter is, according to the author, a condensed version of the original part of her *Habilitationsschrift*. Lurger promises the reader an expanded version of legal theory considerations in a future publication.

³ B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, (Springer Verlag, 2002), 469.

⁴ See for instance recently, J. Gordley, 'Contract', in M. Tushnet (ed.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 3-20.

cooperation in the market, as well as the minimalization of opportunistic behaviour). Lurger concludes that no distinction should be made according to the type of contract: cooperation and fairness should underlie both commercial and consumer contracts in all stages of the contractual relationship.

For three reasons, which we will set out below, we disagree with Lurger that the principle of 'Rücksichtnahme und Fairness' provides a satisfactory foundation for contract law.

In the first place, we object to the *general nature* of the principle. Although contract law should respond to the needs of certain types of contractual relationships, this should be done with restraint, and not on the basis of a general principle of cooperation and fairness but on the basis of concrete considerations in protective mandatory law on a case-by-case basis as the need arises.

Secondly, we doubt whether the principle *underlies* contract law at all. We doubt, for instance, that the consumer contract relationship is characterized by cooperation (and fairness). In the words of Wightman:

'... the ideal of cooperation is in tension with many modern contract rules which are concerned to protect so called weaker parties, notably consumers. Measures such as cooling off periods, or non-excludable standards for product safety and quality, strengthen the position of consumers compared with the classical law. This does not so much involve fostering cooperation between consumer and supplier, as giving consumers rights which they are free to use entirely in their own interests, without any need to weigh the interest of the other party. ... In short, consumers are allowed to be more selfish than is consistent with the idea of cooperation.'⁵

We also do not think that the principle (equally) underlies all European contract law systems. Take for example English law, which rejects the duty of contracting parties to act in good faith in general, let alone that this should form one of the foundations for contract law. In addition, looking at the contract law that already exists at a European level, it is difficult to conclude that this is premised on a principle of cooperation and fairness. The underlying objective of the existing directives in the field of contract law is to facilitate the functioning of the internal market. They are aimed at promoting competition between European suppliers of goods and services by providing certain protection to consumers in order to entice them to become participants in the European market. The aim of these directives and the nature of the protection included in them cannot be characterized by a principle of cooperation.

Thirdly, we do not believe that the principle *should underlie* contract law. Especially with regard to commercial contracts (contracts between commercial parties), we disagree with Lurger that the underlying principle should be one of fairness and cooperation. In our opinion the imposition of a general principle of cooperation and fairness in contract law would contradict the competitive market. A functioning competitive market should leave contracting parties in principle free to pursue their own interests, provided they are prepared to face the consequences attached to their individualistic behaviour by existing rules on mistake /misrepresentation and breach of contract etc. Although there may be practical advantages to cooperating, in particular in the case of long-term contractual relationships, in our opinion this should not however be imposed on contracting parties as a legal duty that forms the foundation of their contract. If commercial parties agree that mutual cooperation is important to their contractual relationship, the principle of freedom of contract allows them to include (an) element(s) of cooperation in their contract.

⁵ J. Wightman, *Contract. A Critical Commentary*, (Pluto Press, 1996), 94.

Our objection to the imposition of a general principle of cooperation can further be illustrated with regard to the specific example of duties of disclosure. According to Lurger, there should be a general rule that a party possessing any information that is relevant to the contract, is under a duty to disclose that information, even if the other party is generally in a better position to acquire information. In case of commercial contracts we do not believe that such a general duty of disclosure should be imposed. A negotiating party should not be precluded from pursuing his own interests and gaining the best possible bargain. Thus 'non-disclosure of some informational advantage is simply prudent bargaining - contractors are involved in a competitive situation and cannot be expected to disclose their hands ...'.⁶ What may be regarded as morally desirable behaviour should not be immediately translated into a legal duty, especially not in the commercial context.

4. CONCLUSION

Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union is a well-researched book - which is reflected in the comprehensive bibliography - that addresses a wide variety of issues that are relevant to the current discussion on the development of a European contract law. Lurger rightly concludes that before a next step is taken in the development of European contract law, it is necessary to consider what the underlying values of such a system are to be. Although we may not agree with Lurger on certain fundamental topics, we nevertheless consider this book to be a highly stimulating and valuable contribution to this debate and the discussion on the harmonization of contract law in Europe. It is very readable and we highly recommend it.

Nicole Kornet and Robert Hardy, Ph.D Researchers, Universiteit Maastricht.

⁶ J. Adams and R. Brownsword, *Understanding Contract Law*, (Sweet & Maxwell, 1996), 184.